

ENTERED ON
MAY 29 2009
DOCKET

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
WILBURN TERRY MORGAN, JR.,)	CASE NO. 07-69667 - MHM
)	
Debtor.)	
)	
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JOHN W. RAGSDALE, JR., Trustee,)	
)	
Plaintiff,)	
v.)	ADVERSARY PROCEEDING
)	NO. 08-6651
WILBURN TERRY MORGAN, JR.,)	
ROBYN MORGAN,)	
WILBURN T. MORGAN, SR.,)	
)	
Defendants.)	

ORDER DENYING MOTION TO SET ASIDE DEFAULT JUDGMENT

Plaintiff's complaint to determine dischargeability was filed and summons issued December 3, 2008. Plaintiff's affidavit of default and motion for default judgment as to Defendant Wilburn Terry Morgan, Jr. ("Defendant") were filed February 12, 2009 [Doc. #s 12 and 10, respectively], both of which were served upon Debtor/Defendant and Debtor's attorney. Default was entered by the Clerk February 13, 2009. Default judgment was entered March 19, 2009.

On April 5, 2009, Defendant filed a motion to set aside entry of default judgment [Doc. No. 25]. Plaintiff filed a response opposing Defendant's motion.

Defendant's attorney shows that she joined the firm in late December, 2008, after two prior attorneys were dismissed. Thereafter, apparently Defendant and Defendant's attorney failed to find time to meet and to answer this adversary proceeding until after the default judgment was entered. The delay in that meeting may have been, in part, the result of Defendant's apparently unfounded belief that he was being represented in this adversary proceeding by the attorney representing the other two defendants.

Plaintiff argues Defendant's default should not be excused because, early in this proceeding, Plaintiff had readily agreed to extend the time for filing an answer and had delayed filing a motion for default judgment until three weeks after that time had expired. Defendant failed to allege a meritorious defense. Plaintiff shows that Plaintiff and the other defendants in this adversary proceeding have already engaged in discovery and are in the process of negotiating a settlement. Additionally, the recovery sought by Plaintiff against Defendant is only that his transfer of property be avoided. Plaintiff does not seek any monetary damages from Defendant.

Bankruptcy Rule 7055, based on F.R.C.P. 55(c), provides:

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

F.R.C.P. 60(b) provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence,

surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Defendant has alleged no facts that would support a finding in his favor under Rule 60(b)(2)-(6). It appears Defendant seeks setting aside the default judgment as the result of excusable neglect.

In the case of *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380; 113 S. Ct. 1489 (1993), the Supreme Court defined a flexible standard for excusable neglect. Relief from defaults under the excusable neglect standard "is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer." *Id.* The determination of what sorts of neglect are excusable is an equitable one, involving consideration of all the surrounding circumstances. Such considerations include prejudice to the opposing party, length of the delay, potential impact on the proceedings, reason for the delay, whether the delay was within the reasonable control of the defaulting party and whether that party acted in good faith.¹

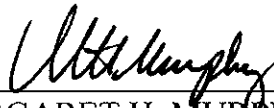
¹The Supreme Court expressly rejected the Circuit Court holding that the client should not be penalized for the omissions of their attorney. The Supreme Court reiterated its position that clients must be held accountable for the acts and omissions of their attorneys.

A defendant may establish grounds to set aside a default judgment pursuant to Rule 60(b) if the defendant shows (1) [it] has a meritorious defense that may affect the outcome, (2) granting the motion to set aside would not result in prejudice to the plaintiff [the nondefaulting party], and (3) good reason existed for failing to reply to the complaint. *Florida Physician's Insurance Co., Inc. v. Ehlers*, 8 F. 3d 780(11th Cir. 1993). A technical error or slight mistake by the party's attorney will not deprive the party of the opportunity to present the merits of [its] claim. *Id.* A party has a duty of diligence, however, to ensure that [its] attorney is protecting [its] interests. *Id.* "[T]he setting aside of a default judgment where no good reason has been offered for the default constitutes an abuse of discretion." *Gower v. Knight*, 833 F.2d 1515 (11th Cir. 1987).

Defendant failed to allege a meritorious defense and failed to show that either Defendant or Defendant's attorney exercised due diligence. Under the circumstances of this case, Defendant has failed to show good cause to set aside the default judgment. Accordingly, it is hereby

ORDERED that Defendant's motion to set aside the default judgment is **denied**.

IT IS SO ORDERED, this 29th day of May, 2009.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE